

Supreme Court, U. S.

FILED

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IN THE

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975.

No. **75-542**

Parcel I.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

WILLIAM T. MORRIS, JR., MARY BERENICE McCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partner-
ship, LINCOLN SAVINGS BANK OF BROOKLYN,
Defendants,

Relative to acquiring certain real property situate in the City of
Yonkers, County of Westchester, State of New York.

Parcel II.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

DAB-O-MATIC CORP. and GAZETTE PRESS, INC.,
Defendants-Appellants,
and

WILLIAM T. MORRIS, JR., MARY BERENICE McCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partner-
ship, LINCOLN SAVINGS BANK OF BROOKLYN, CLOVER
WIRE FORMING CO., INC., WOODHAVEN DRESS CO., INC.,
Defendants,

Relative to acquiring certain real property situate in the City of
Yonkers, County of Westchester, State of New York.

Index No. 7296/73.

Parcel III.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

WILLIAM T. MORRIS, JR., MARY BERENICE McCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partner-
ship, LINCOLN SAVINGS BANK OF BROOKLYN, JOHN
JOHNSON, J. BEST, S. WATLINGTON and RICHARD R.
EARLS,
Defendants,

Relative to acquiring certain real property situate in the City of
Yonkers, County of Westchester, State of New York.

(Continued on Back of Cover)

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

LESTER WEINBERG, individually and doing business as
GREAT EASTERN METAL PRODUCTS Co.,
Defendant-Appellant,

Relative to acquiring certain real property situate in the City of
Yonkers, County of Westchester, State of New York.

Index No. 7357/73.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,
against

MARY BARCA as executrix of the Last Will and Testament of
THOMAS BARCA, NANCY BARCA and ANGELO BARCA, JR.,
all doing business as BARCA BROS.,
Defendants-Appellants,
and

The COUNTY TRUST COMPANY as Executor under the Last Will
and Testament of MAITLAND BREHOUSE, deceased,
Defendant,

Relative to acquiring certain real property situate in the City of
Yonkers, County of Westchester, State of New York.

Index No. 7326/73.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

**Appellants' Brief Opposing Motion to Dismiss and to
Affirm.**

MORTON N. WEKSTEIN,
Attorney for Appellants,
55 Pondfield Road,
Bronxville, N. Y. 10708
(914) 961-7500.

WEKSTEIN, FRIEDMAN & FULFREE,
Counsel.

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October Term, 1975.

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Plaintiff-Respondent,

against

WILLIAM T. MORRIS, JR., MARY BERENICE MCCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partner-
ship, LINCOLN SAVINGS BANK OF BROOKLYN,

Defendants,

Relative to acquiring certain real property situate in the
City of Yonkers, County of Westchester, State of New
York.

Parcel II.

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Plaintiff-Respondent,

against

DAB-O-MATIC CORP. and GAZETTE PRESS, Inc.,

Defendants-Appellants,

and

WILLIAM T. MORRIS, JR., MARY BERENICE MCCALL, THOMAS
Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partner-
ship, LINCOLN SAVINGS BANK OF BROOKLYN, CLOVER WIRE
FORMING Co., Inc., WOODHAVEN DRESS Co., Inc.,

Defendants,

Relative to acquiring certain real property situate in the
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Plaintiff-Respondent,

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 Q. MORRIS, M. D., FINECAP REALTY COMPANY, a partner-
 ship, LINCOLN SAVINGS BANK OF BROOKLYN, JOHN JOHN-
 SON, J. BEST, S. WATLINGTON and RICHARD R. EARLS,

Defendants,

Relative to acquiring certain real property situate in the
 City of Yonkers, County of Westchester, State of New
 York.

YONKERS COMMUNITY DEVELOPMENT AGENCY,
Plaintiff-Respondent,

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LESTER WEINBERG, individually and doing business as
 Great Eastern Metal Products Co.,

Defendant-Appellant,

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YONKERS COMMUNITY DEVELOPMENT AGENCY,
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against

MARY BARCA as executrix of the Last Will and Testament
 of Thomas Barca, NANCY BARCA and ANGELO BARCA, Jr.,
 all doing business as Barca Bros.,

Defendants-Appellants,

and

THE COUNTY TRUST COMPANY as Executor under the
 Last Will and Testament of Maitland Brenhouse, de-
 ceased,

Defendant,

Relative to acquiring certain real property situate in the
 City of Yonkers, County of Westchester, State of New
 York.

Index No. 7326/73.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF
 NEW YORK.

**Appellants' Brief Opposing Motion to Dismiss and to
 Affirm.**

POINT I.

The payments to the defendants for fixtures and for moving expenses are matters foreign to the present appeal.

On page 3 of plaintiff's brief there is recited an account of payments made to various defendants for moving expenses, for fixtures, and withdrawal of moneys deposited by the plaintiffs.

Moving expenses are granted by administrative fiat and are not part of any claim which can be advanced in a condemnation proceeding. Except for a possible proceeding in the nature of mandamus (not here present) moving expenses are never litigated in court.

More important, all of the payments recited on page 3 of plaintiff's brief were made after stipulations were entered by all parties to the effect that all such payments should be made by the plaintiff and received by the defendants without prejudice to the rights of the defendants to pursue their contention that the takings were constitutionally prohibited, throughout the entire appellate process.

POINT II.

The order of the New York Court of Appeals is final.

At page 37 of defendants' jurisdictional statement there were discussed the case of *Catlin v. United States*, 324 U. S. 229, and reasons why as to the defendants who were fee owners (Barca and Weinberg) the present appeal is not premature. Point I of plaintiff's brief frames this issue on the question of whether the Court of Appeals'

order is final. Immediately there arises the matter of the defendants who were (or are) the holders of long term leases (Dab-O-Matic Corp. and Gazette Press, Inc.). As to them the Court of Appeals' order is as final as any order or judgment can ever be final. If the takings in eminent domain are indeed constitutional, as the Court of Appeals has found, the right of these lessees to the remainder of their terms has been cut off by the terms of their leases, as has their right to compensation. Thus there is no further avenue open to them, and as to them the litigation is now concluded. No hearing on the subject of compensation will ever be held as to them, since under the Court of Appeals' order they are deprived of compensation as a matter of law. Unless there is an appeal to this court, the matter is finally and forever concluded as to them.

If, on the other hand, it is ultimately determined that the instant taking was unconstitutional, then the unexpired terms of the leases did not cease and determine, and the tenants were unlawfully ousted of their right to possession by the plaintiff. In such case the taking was tortious, and the tenant defendants are entitled to damages for the loss of use and occupation of their respective premises, plus consequential damages. Such damages are recoverable in New York in the instant proceeding.

§24 of the New York State Condemnation Law provides as follows:

"§24. Temporary possession pending proceedings

"When it appears to the satisfaction of the court at any stage of proceedings that the public interests will be prejudiced by delay, it may direct that the plaintiff be permitted to enter immediately upon the real property to be taken, and devote it temporarily to the public use specified in the peti-

tion, upon the deposit with the court of a sum to be fixed by the court upon a notice to the parties of not less than eight days and such sum when so fixed and paid shall be applied, so far as it may be made, with interest thereon from the date of the entry of the petitioner upon such real property, and the costs and expenses of the proceeding, and the residue, if any, returned to the plaintiff, and, in case the petition should be dismissed, or no award should be made, or the proceedings should be abandoned by the plaintiff, the court shall direct that the money so deposited, so far as it may be necessary, shall be applied to the payment of any damages which the defendant may have sustained by such entry upon and use of his property, and his costs and expenses of the proceedings, such damages to be ascertained by the court, or a referee to be appointed for that purpose, and if the sum so deposited shall be insufficient to pay such damages, and all costs and expenses awarded to the defendant, judgment shall be entered against the plaintiff for the deficiency, to be enforced and collected in the same manner as a judgment in the Supreme Court; and the possession of the property shall be restored to the defendant. As amended L. 1923, c. 246, eff. April 19, 1923."

If the existing order of the Court of Appeals remains undisturbed, the defendants, who are tenants, are deprived of any recourse in this proceeding or any other action or proceeding.

CONCLUSION.

For the foregoing reasons and those exposed in defendants' jurisdictional statement, probable jurisdiction should be noted.

Respectfully submitted,

MORTON N. WEKSTEIN,
Attorney for Appellants.

WEKSTEIN, FRIEDMAN & FULFREE,
Counsel.